United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

76-1087

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P/S

United States Court of Appeals
For the Second Circuit

Docket Numbers 76-1087,
1088, 1093, 1094

UNITED STATES OF AMERICA,

Appellee,

v.

BENNY ONG, WONG WAH,
TOM HOM and ALBERT YOUNG,

Appellants.

On Appeal From The United States District Court
For the Southern District of New York

PETITION ON BEHALF OF APPELLANT ALBERT YOUNG FOR REHEARING OR IN THE ALTERNATIVE FOR THE ISSUANCE OF AN ORDER STAYING THE MANDATE OF THIS COURT AND CONTINUING THE APPELLANT ON BAIL PENDING APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

BENNY ONG, WONG WAH,
TOM HOM, and ALBERT YOUNG,

Appellants.

----------x

Docket Numbers

76-1087, 1088, 1093, 1094

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION ON BEHALF OF APPELLANT ALBERT YOUNG FOR REHEARING OR IN THE ALTERNATIVE FOR THE ISSUANCE OF AN ORDER STAYING THE MANDATE OF THIS COURT AND CONTINUING THE APPELLANT ON BAIL PENDING APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To The United States Court of Appeals For The Second Circuit:

ALBERT YOUNG, one of the appellants above named, respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled case and in support of this petition represents to the Court as follows:

The appellant reserves his argued position as to each of the points heretofore raised on appeal, but in this petition addresses himself solely to those aspects of the opinion of this Court decided on September 14, 1976 wherein the Court may be convinced that its result is based on the mis-

apprehension of certain matters pertaining to the issues originally raised on appeal.

Therefore, this petition respectfully seeks to convince the court that it has erred in its determination with respect to the following stated issues:

First, by changing the former ruling of this Circuit in respect to the establishment of Lack of Good Faith and requiring proof of Bad Faith, appellant was deprived of the opportunity to brief the facts demonstrating the Government's "Bad Faith", which has been done within this Petition for Rehearing.

Second, the ruling that the denial by the Trial Court of the motion for a mistrial and severance by appellant Young after the dismissal of the Conspiracy Count was of Constitutional dimension (United States Constitution, Sixth Amendment) and not merely "Harmless Error".

If the instant petition for rehearing is denied, the appellant Young respectfully petitions this Court for the issuance of an order staying the mandate of this Court and continuing him on bail pending the disposition of a Petition for a Writ of Certiorari to be filed with the Supreme Court of the United States in accordance with the statutes and rules applicable thereto.

As To A Rehearing Of The Limited Aspects Of This Appeal

I.

The inclusion of the defendant YOUNG in the Conspiracy Count was not in Good Faith and was merely a ploy to get before the Jury inflammatory, prejudicial, and irresponsible statements made by co-defendants concerning the appellant YOUNG, and denied the appellant the right of confrontation guaranteed him by the Sixth Amendment of the Constitution of the United States and was of Constitutional dimension.

Appellant Young has contended that the inclusion of him in the Conspiracy Count was not in Good Faith and therefore required the granting of his motion for a severance after the dismissal of the Conspiracy Count by the Court at the close of the Government's case. United States v. Aiken, 373 F.2d 294, 299 (2nd Cir. 1967); United States v. Branker, 395 F.2d 881 (2nd Cir. 1968).

By its decision, the Court has redefined and rewritten the standards existing in this Circuit for determining "Good Faith" on the part of the Government in drafting a Conspiracy Count which subsequently is dismissed at the trial level. There can be no question that the appellant put the Government on notice by his motion to dismiss or sever, which was before the Court some eight months prior to the trial (S.O. 5525). *

In 1967 in United States v. Aiken, supra, this Court in an opinion written by LUMBARD, C.J., set forth two criteria to be used to determine whether or not a severance should be granted during trial if the count

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* Numbers preceded by "S.O." are references to the Slip Opinion of this Court.

justifying the joinder of a defendant is dismissed. These were:

1. The defendant was prejudiced by the joinder;

OR

2. The Count dismissed was not alleged by the Government in "Good Faith".

Good Faith was defined as requiring a finding that there "was reasonable expectation that sufficient proof would be forthcoming at the trial." The exact words of the Court were:

> " Where joinder was originally proper under Fed. R. Crim. P. 8(b), *** a motion for severance after the count justifying joinder (here the conspiracy count) is dismissed will not be granted unless the defendant was prejudiced by the joinder or the count dismissed was not alleged by the government in good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial."
> 373 F. 2d at 299. See Schaffer v. United States, 362 U. S. 511, 80 S. Ct. 945, 4 L. Ed. 2d 921 (1960).

This delineation as well as the definition of "Good Faith" has been followed by this Circuit right up to September 14, 1976. On that date, this Court in its opinion in the within case, after first seemingly continuing the two criteria plus the above definition of "Good Faith" in its opinion (S. O. 5526-27), without warning, executed a complete 180 degree turn and added a new dimension to its definition of "Good Faith", to wit:

> " We do not, however, equate novelty or even error with bad faith. In the absence

> of proof that the government's theory was frivolous or clearly rejected by recent precedent of which it was or should have been aware, we will not find that an argument has been prompted by bad faith simply because it is unsuccessful."
> (S.O. 5527-28)

The opinion herein recognizes that the Court suffered no surprises in the testimony adduced at the trial.

> "The government's proof was based almost entirely on testimony elicited from the INS investigators and on tapes of conversations with the defendants. Thus, the government knew well in advance what evidence it would be able to introduce at trial."
> (S.O. 5527)

However, we respectfully suggest that the record demonstrates that the inclusion of the appellant Young in the Conspiracy Count did not only fail to meet the test of "Good Faith" delineated in United States v. Aiken, supra, and United States v. Branker, supra, but such inclusion was actually in "Bad Faith".

Intentions of a party are demonstrable not only by their words and deeds at the time of their actions, but also by their subsequent use of the results of their acts.

Here, the Government through its prosecutor, after the dismissal of the Conspiracy Count against Young, proceeded in its summation in chief, not in rebuttal of Young's summation, to use the hearsay evidence admitted by reason of the charge of Conspiracy against not only the defendant Ong, which the Court ruled was permissible (956), but also with full force against

the defendant Young.

> " But I submit to you, too, that you may find from the evidence that Benny Ong was not always puffing and boasting; was not always full of hot air, as Mr. Markewich would have you believe. He talked facts, figures and dates. He told you about the $5,000 he had laid out for Albert Young for police inspector --
> " Mr. Rosenthal: That is objected, if the Court pleases.
> " The Court: I will instruct the jury -- I will sustain the objection in part, but the jury may not consider whether or not any money was laid out for Albert Young in determining the case concerning Mr. Ong or Mr. Young. They may, however, consider with respect to Mr. Ong the fact of his having made the statement if the jury finds that he in fact did make the statement. But as to Mr. Young, the statement is hearsay.
> " Mr. Kuriansky: [continuing] He told you about this $5,000. He told you about it on three different occasions, not three different stories, just three different times he told the story.
> " He told you it was two years ago; that it was to protect gambling and vice from 14th Street to Mulberry Street, and he told you how he made Young pay him back $500 a week for ten weeks.
> " You listened to it. You decide if there was not a ring of truth to many of Mr. Ong's statements. "
>
> (955-6; App. F. 25-26; B30)* [Emphasis Supplied]

Despite the Court's ruling that the prosecutor's reference to the statements made by Mr. Ong on the tapes could not be used in respect to the appellant Young and were pure hearsay, he proceeded to get full benefit of the wrongful inclusion of appellant Young in the Conspiracy Count by further arguing to the jury that Ong's reference to having paid $5,000 for

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* Numbers preceded by "B" are page references in Young's Brief.

the benefit of Young to an unnamed "police investigator", was not only truthful but tacitly admitted by appellant Young. His exact words were as follows:

> " What about Mr. Young? He knew about money, how to turn a profit.
>
> ***
>
> " Incidentally, what was Albert Young's reaction to this story about the $5,000? He was confronted with it. Yes, it is true that at one point late in the conversation he gave a hollow denial. But his first reaction when they caught him unaware was that he didn't want to say nothing about it.
> " Then later, that he didn't like big mouths like Benny Ong talking about those kinds of things.
> " Ladies and gentlemen, this was a careful man. He was careful enough to reap the benefits of this scheme and yet protect himself from any direct association with these other defendants.
> " He knew the dangers of that, the greater likelihood of being caught. He knew the advantages of secrecy, and he repeatedly cautioned Granelli and Kibble about it. This was not a man who was going to blurt out his prior history of corrupt conduct. This was a man who talked by indirection, but I submit to you that it is all there in those transcripts, on the lines and between the lines."
> (958-9; App. F28-29; B 30) [Emphasis Supplied]

The above quotes and argument were not included in appellant's brief before this Honorable Court since counsel had no expectation that this Court would change its long-standing ruling in the cases of United States v. Aiken, supra, United States v. Branker, supra, and their progeny.

It is respectfully submitted that since direct reference was not made to the statements of the prosecutor appearing at pages 958-59, in any of the briefs submitted at the time of argument of this appeal, that the Court quite understandably overlooked and did not realize that there was proof within this record of the "Bad Faith" of the Government.

What clearer proof is required that the Government knew from the moment it included a Conspiracy Count, which they could not hope to sustain, against the defendant that they had visions of getting the inadmissible hearsay evidence against Young before a Trial Jury and using it to convict him in violation of his Sixth Amendment rights of confrontation, due to the inability of his attorney to cross-examine a tape. The prosecutor who arraigned the appellant and obtained the indictment in 1974 and tried the case in 1975 were one and the same.

Although the hearsay admitted here does not come under the doctrine enunciated in Bruton v. United States, 391 U.S. 123, since it was not a post-arrest confession or admission, the principles appearing in the opinions of Mr. Justices BRENNAN and STEWART are applicable.

Mr. Justice STEWART's comments in his concurring opinion are particularly in point herein:

> " Quite apart from Jackson v. Denno, however, I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement

> of a co-defendant, who is not subject to cross examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see, e.g., Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065; Douglas v. Alabama, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give. See the Court's opinion, ante at 485, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused, rather than admissible for the little it may be worth. Even if I did not consider Jackson v. Denno controlling, therefore, I would still agree that Delli Paoli must be overruled." (391 U.S. 138-39).

To expect any Lay Jury, or even a jury of lawyers to perform the mental gymnastics contained within the cautionary instructions of the Court below at page 955, which is quoted at length supra, is to subscribe to the theory that computers have the ability to reproduce. It is our most respectful position that the foregoing demonstrates that the attention of this Court had not been directed to the proof establishing the lack of Good Faith and proof positive of Bad Faith on the part of the Government.

II.

The refusal of the Trial Court to grant a mistrial and a severance to appellant YOUNG after its dismissal of the Conspiracy Count was of Constitutional dimension and not merely "Harmless Error" and constituted an abuse of discretion.

This Honorable Court recognized the prejudice to the appellant by his joinder with the co-defendants in the Conspiracy Count and that evidence against the defendant-appellant Ong definitely had a spill-over effect and found:

> " We cannot, however, agree that Young's joinder with the other defendants was free from prejudice. As Judge Brieant stated, Young's mention of Ong's arrangement with INS investigators may have allowed the government to introduce into evidence at a separate trial of Young the outlines of the conspiracy proven at this trial. It is improbable, however, that the evidence concerning the nefarious reputation of Ong or any mention of the subjects presently complained of and discussed infra would have played any role in a trial of Young alone. Nor is it likely that the government would have been permitted to introduce the multitude of tapes concerning solely the other defendants in which they literally convicted themselves out of their own mouths. These facts, when added to the prejudice inherent in any multi-defendant trial, make it possible that Young's relationship to the other defendants, by reason of his physical presence in the courtroom, injected an element of guilt by association into the jury's deliberations. See United States v. Branker, 395 F.2d 881, 887-89 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969); cf. United States v. Kompinski, 373 F.2d 429 (2d Cir. 1967)." (S.O. 5528)

It is respectfully submitted that the finding of this Court that the error committed was "Harmless Error" by reason of the overwhelming proof of defendant's guilt which would have produced the same result if Young had been tried separately, is in error because it fails to take into account the following factors:

1. On a separate trial, Young would have taken the stand and testified in his own behalf. His reluctance to do so when on trial with co-defendants who were well known in the extremely small (geographically) and well-knit locale of all of the defendants, i.e., Chinatown, would have been obvious to this Court.

2. The tape of the first taped conversation (the transcript of which tape has been submitted to the Court and a copy of which is annexed hereto as an addendum) with Young and the INS Agents Granelli and Kibble, in which the ground rules were laid down, and which would have been inadmissible against appellant Young in a separate trial, clearly demonstrated that Young was not asking them to violate their lawful duty and was merely attempting to establish his right, as secretary of the Tsung Tsin and Tsung Ngar Associations, to decide who might or might not enter the premises.

In interpreting the conversation, the Court should have considered the unusually broad powers granted to Officers and employees of the Immigration and Naturalization Service set in §1357 of Title 8 of the United States Code. The pertinent portion of same reads as follows:

> §1357. Powers of Immigration Officers and Employees--Powers Without Warrant.
>
> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant --

***

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.

The testimony of Kibble and Granelli demonstrates that the above subdivision 3 of Section (a) has been interpreted by the Immigration and Naturalization Service and the Courts that the word "dwellings" used therein applies to both commercial and residential buildings. Granelli testified as follows:

" Q. Investigator Granelli, am I correct that in spite of the wide range of powers given to people in your position and other persons employed by the Immigration and Naturalization Service, there is a prohibition against entering a dwelling without permission?
A. Without consent or without a warrant, yes, sir.
Q. Or without a warrant; is that right?
A. Yes, sir."
(565)

Kibble admitted that Young had told them that he had no objection to their being in front of the premises at One Catherine Street, but that before they attempted to enter, he wished to be advised first. His exact words were:

" Q. And Albert saying, 'You can pass the outside. You go inside you must let me know first.'
Do you recall that or words to that effect?

A. Yes, sir.
Q. And then there was a discussion as to how he was to be told first, was there not?
A. I believe so, sir.
Q. What?
A. I believe so, sir."

* * *

" Q. Then you asked him, 'Then how do we let you know that we're going to come there? Do we call you?'
And Albert replied, 'You should come. One guy. Don't call me, because my phone on tap. Don't call.'
Right?
A. I believe so, if that's what it says, sir.
Q. And he told you to come up through the premises of the Tsung Tsin Association on One Division Street and tell him when you wanted to go into One Catherine Street, did he not?
A. I believe so, sir, yes, sir.
Q. And you know, do you not, as you sit there, that your authority to enter a premises without a warrant is limited to somebody consenting to your entering the premises?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir."
(716, 717)

There had been prior testimony by both Kibble and Granelli that part of the procedure of their squad was to patrol in front of the premises when they could not obtain consent to enter. There was also testimony that shortly before the meeting with Young on or about December 12, 1973, someone other than Young had given them permission to enter.

Although this Court and apparently the Court below proceeded on the assumption that the operation at One Catherine Street constituted "illegal gambling", the fact is no convictions have been had in any Court, City, State or Federal, in connection with the use of the premises One Catherine Street to the knowledge of Investigator Granelli (561).

Upon a separate trial of the defendant Young, it would have been demonstrated with much more particularity than it could be on the joint trial that there was economic coercion, as evidenced by the fact that the investigators had not searched for or entered the office of the Off Track Betting Corporation located at Bowery and Pell Streets, frequented by many Chinese among whom one might expect to find "illegal aliens" (576-77).

It is respectfully submitted that this Honorable Court should reconsider its ruling of "Harmless Error" and take into consideration the fact that the trial of Young as an individual defendant must have been vastly different than that had in the Court below where he was joined with the co-defendants.

Conclusion

As to staying the issuance of the Court's mandate and continuing the appellant on bail pending application for a Writ of Certiorari to the Supreme Court

If this Court should deny the instant petition for a rehearing the appellant Young intends to present to the United States Supreme Court a petition for a writ of certiorari. It is respectfully prayed that the issuance of the mandate of this Court be stayed and the petitioner continued on bail until the determination of said petition for a Writ of Certiorari.

Appellant Young has been continued on bail herein pending appeal in the same amounts and under the same terms and conditions as previously applied.

The appellant is a married man who resides with his wife in a private house. He has no prior conviction, his only prior arrest some thirty years ago resulted in an acquittal. He has always responded to the edicts of the court and fulfilled his bail obligations.

It is respectfully submitted that the questions above discussed as well as those set forth in the original appeal are not frivolous but in fact are questions of great substance and significance which merit a review by the United States Supreme Court.

No prior application for the relief sought herein has been made.

For the foregoing reasons, appellant herein respectfully requests that a rehearing be granted or that, in the alternative the issuance of the mandate of this Court be stayed and the appellant Young continued on bail pending the filing and disposition of his Petition for a Writ of Certiorari to the Supreme Court of the United States.

Respectfully submitted,

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(212) CA 6-7971

Dated: September 23, 1976

STATE OF NEW YORK)
(ss.:
COUNTY OF NEW YORK)

GILBERT S. ROSENTHAL, being first duly sworn, on oath certifies and says:

That he is the attorney for the appellant in this cause; that he makes this certificate in compliance with the rules of this court; that in his judgment the within and foregoing petition is well founded and is not frivolous or interposed for delay.

GILBERT S. ROSENTHAL

(Subscribed and sworn to before me this 27th day of September, 1976)

WILLIAM C. HERMAN

Notary Public, State of New York
No. 60-1770600
Qualified in Westchester County
Term Expires March 30, 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

ALBERT YOUNG,

Petitioner.

SUGGESTION FOR A REHEARING EN BANC

Docket No. 76-1087

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The Petitioner, ALBERT YOUNG, suggests to this Court that his Petition for a Rehearing in the above-entitled case and filed on even date herewith be heard en banc for the following reasons:

1. The issues raised by the Petitioner in his Petition for a Rehearing directly confront the issue of violation of the Sixth Amendment rights of the appellant Young to confrontation. The importance of this question raised by Petitioner in his appeal is of great and general significance.

2. The decision entered by this Court affirming Petitioner's conviction came almost four months after oral argument and in this Court's Opinion it was acknowledged that Petitioner's argument had force.

3. The decision entered by this Court affirming Petitioner's conviction contradicts the prior rulings of this Circuit in United States v. Aiken, 373 F. 2d 294, decided February 20, 1967, the Bench consisting

of LUMBARD, C.J., FRIENDLY, C.J., and HAYS, C.J.; and its decision in United States v. Branker, 395 F.2d 881, decided May 13, 1968, the Bench consisting of HAYS, C.J., KAUFMAN, C.J., and RYAN, D.J., in that it adds a new dimension and requires proof positive of "Bad Faith" on the part of a prosecutor in including a defendant in a subsequently dismissed Count of an Indictment, which Count was the sole basis for the joinder of that defendant under Fed. R. Crim. P. 8 (b).

WHEREFORE, the Petitioner, ALBERT YOUNG, respectfully suggests that he be granted a rehearing of the above appeal en banc.

Yours, etc.,

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ADDENDA

OPINION OF THE COURT OF APPEALS DATED SEPTEMBER 14, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1052-1055—September Term, 1975

Argued: May 20, 1976 Decided: September 14, 1976

Docket Nos 76-1087, 76-1088, 76-1093, 76-1094.

UNITED STATES OF AMERICA,

Appellee,

v.

BENNY ONG, WONG WAH, TOM HOM AND ALBERT YOUNG

Defendants-Appellants.

Before:

LUMBARD, FRIENDLY AND [illegible]ES,

Circuit Judges.

Appeal from convictions entered in the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge*, for bribery and conspiracy to bribe investigators of the Immigration and Naturalization Service.

Affirmed.

GREGORY J. POTTER, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Lawrence B. Pedowitz and John C. Sabetta, Assistant

United States Attorneys, on the brief), *for appellee*.

DANIEL MARKEWICH, Esq., New York, N.Y. (Markewich Rosenhaus Markewich & Friedman, P.C., New York, N.Y., Goldman & Hafetz, New York, N.Y., Lawrence S. Goldman and Frederick P. Hafetz, New York, N.Y., on the brief), *for defendant-appellant Benny Ong*.

WILLIAM C. HERMAN, Esq., New York, N.Y. (Julia P. Heit, New York, N.Y., on the brief), *for defendant-appellant Wong Wah*.

JAMES A. CUDDIHY, Esq., New York, N.Y., *for defendant-appellant Tom Hom*.

GILBERT S. ROSENTHAL, Esq., New York, N.Y., (Julia P. Heit, New York, N.Y., on the brief), *for defendant-appellant Albert Young*.

LUMBARD, *Circuit Judge*:

Benny Ong, Wong Wah, Tom Hom and Albert Young appeal from their convictions after a nine-day trial before Judge Brieant in the Southern District and jail sentences imposed on them on February 11, 1976.[1] Ong, Wah and

1. Judge Brieant sentenced defendant Ong to five years imprisonment on Count One, the conspiracy count, and eight years on Counts Two through Sixty-one and Seventy-four through Seventy-eight, all sentences to run concurrently. Wah was sentenced to concurrent terms of three and a half years imprisonment on Count One and on Counts Thirty-five through Sixty-three. Hom was sentenced to concurrent terms of three years imprisonment on Count One and on Counts Sixty-four through Seventy-

Hom were convicted of participating in a conspiracy from October 1973 to July 1974 to bribe criminal investigators of the Immigration and Naturalization Service and numerous counts of bribery on specified dates. Young was convicted on 20 counts of bribery, the court having dismissed the conspiracy count against him at the end of the government's case.

Young complains that as the government did not act in good faith in charging him with membership in the conspiracy which it knew it could not prove, the court should have granted his motions for a severance and later for a mistrial. All the appellants allege that the admission of irrelevant, unduly prejudicial and inflammatory evidence regarding other crimes deprived them of a fair trial. They also assert that improper remarks in the prosecutor's summation deprived them of a fair trial. In addition, appellant Wah complains that the trial judge erroneously curtailed his counsel's cross-examination of INS investigator Lawrence Granelli.

As with almost every criminal jury trial which extends over several days and involves multiple defendants, it cannot be said that the record is free from doubt regarding all the rulings on the admission of evidence. But a study of the record in this case, including the transcripts of tape recorded talks with all the defendants relating to bribes and on the occasion of their payment of bribes, leaves us with the strong conviction that the government produced overwhelming proof of the guilt of all the defendants. We view the claims of error accordingly and consider the possible effects of any errors to be less serious than we would if the case against all or any one of the defendants could be considered to be a close question. As we conclude beyond a reasonable doubt that contrary

eight. Young was sentenced to concurrent eighteen month terms of imprisonment on Counts Eighty through Ninety-nine and fined $5000.

rulings on all the matters of which the appellants complain would still have resulted in the verdicts returned by the jury, we affirm all the convictions. Cf. Brown v. United States, 411 U.S. 223, 231-32 (1973).

In October 1973, all four appellants were in the business of running separate gambling houses in Chinatown in Manhattan's lower East Side. Ong was the secretary of the Hop Sing Association, with a branch at 16 Pell Street. Wah was the secretary of the Tai Look Association at 58 East Broadway. Hom managed a place at 22 Pell Street. Young ran the Tsung Tsin Association at 1 Catherine Street. The record discloses that these gambling houses relied heavily on the patronage of illegal aliens.

On October 14, 1973, Ong saw INS investigators Granelli and Brattlie in Pell Street and beckoned them to join him. Ong told the agents he wanted gambling house people to meet with INS officials to make arrangements for checking illegal aliens in the gambling houses. The agents said they would have to speak to their supervisor.

Granelli thereafter spoke to his supervisor who suggested the negotiations continue. That evening, Granelli and a new partner, Investigator James Kibble, met with Ong who told them that he knew of at least eight gambling houses that would each pay $200 per week in exchange for advance notice of INS visits. After this conversation was reported to the INS supervisor the matter was referred to the FBI where Special Agent Henry was charged with the investigation.

Agent Henry obtained the approval from the Department of Justice for use of recording equipment by Granelli and Kibble in their subsequent meetings with Ong and the other defendants. From November 15 on, most of the meetings and telephone conversations between the investigators and the defendants were recorded, and the tapes were introduced into evidence at the trial. It was

through use of these tapes and the testimony of the investigators relating what had transpired at unrecorded meetings that the government implicated all the defendants in the bribery scheme.

Granelli and Kibble testified that on November 6, 1973, they met with Ong to express interest in his offer on behalf of their boss. Later the same evening, the investigators were admitted to the Tai Look basement gambling house by Wong Wah. Wah permitted the investigators to search for illegal aliens and then informed Kibble that he, Wah, had been called by Benny Ong.

On November 8, the investigators again met Ong who told them that some of the gambling house operators had objected to paying as much as $200 per week. However, Ong offered to make payments in that amount for himself, the Catherine Street houses, some of which were allegedly run by defendant Young, and the 58 East Broadway house, which was run by defendant Wong Wah. During this conversation, the investigators expressed anger that Wah approached Kibble and mentioned that Ong had called him. Ong agreed to speak to Wah to prevent future public mention of Ong's name.

The next week the investigators called Ong to arrange a meeting for the first payoff. Ong was accompanied at the subsequent meeting by Wah, and they each gave the investigators $200. Another $400 payment was made at a meeting the following week, during which Ong suggested that the investigators raid the Catherine Street houses which had refused to make payment.

Payments from Ong continued throughout November and into December. During the meetings at which the payments were made, Ong boasted of his cordial relations with New York City police officials and stated that he had been giving money and gratuities to them for several years. He also expressed displeasure with the Catherine

Street gambling operators for not making payments and in particular derided defendant Young, who allegedly owed Ong $5000 for a previous payment made to other police officials on Young's behalf.

On December 12, 1973, Granelli and Kibble drove past 1 Catherine Street looking for illegal aliens when defendant Young motioned to them. In the ensuing conversation, Young told the investigators that he knew of their deal with Ong and that he wanted to make a similar arrangement. The investigators agreed to meet with Young the following day. At the scheduled meeting, Young offered the investigators $200 per week to prevent any raids on his gambling house. Young also requested that Ong not be told of the arrangement.

At a subsequent meeting with the investigators, however, Ong informed them that he knew Young was making payments and wanted to know the amount. Ong suggested that they increase the amount charged to Young and reminded the investigators of Young's previous $5000 delinquency.

Payments to the investigators on behalf of Ong, Wah and Young continued into January 1974. On January 17, the investigators informed Ong that a man had approached two other INS investigators outside of 61 Mott Street and offered to take them to see Benny Ong and to pay them money in order to prevent unexpected raids on a Mott Street gambling house. The agents had reported the incident to the supervisor who was aware of Granelli and Kibble's undercover exploits, and Granelli and Kibble complained to Ong that had the other agents reported the incident elsewhere, trouble would have resulted. Ong said that he knew the identity of the malefactor and would speak to him.

Ong later introduced the man, identified as the defendant Tom Hom, to Granelli and Kibble and informed

them that Hom wanted the same deal that had been arranged with Ong and [illegible]. This offer was accepted and all defendants made [illegible]kly payments throughout the remainder of the per[illegible] charged in the indictment, except for brief periods when Wah and Young temporarily went out of the gambling business.

Following arrests by officers associated with Special State Prosecutor Maurice Nadjari in March 1974, Wah and Hom refused to deal directly with Granelli and Kibble and all payments to the investigators on behalf of these two defendants were made by Ong. At an April 7, 1974 meeting, Ong informed the investigators that he had been arrested by police from Nadjari's office after other officers had confessed that they had accepted bribes from Ong. On July 18, 1974, the defendants were arrested for bribing INS investigators. By that time, Granelli and Kibble had received $6000 from Benny Ong, $3000 from Tom Hom, $6200 from Wong Wah, and $5000 from Albert Young.

At the close of the government's case, Judge Brieant dismissed the conspiracy count with respect to defendant Young. The judge refused, however, to grant Young's motion for a severance.

The making of the payments was not denied as none of the defendants took the stand. The defense was that they were coerced by the investigators into making payments and had to comply with the extortionate demands to prevent destruction of their gambling operations. Defense counsel also argued that gambling was part of an accepted life style in Chinatown and that a long history of discrimination against Chinese in the United States made them especially susceptible to the threats and demands of police and other officials. In its charge, the court instructed the jury that they could consider evidence of coercion in determining whether defendants possessed

the requisite intent to bribe.

The Claim of Multiple Conspiracies

Hom contends that Judge Brieant's charge on the conspiracy count failed to indicate satisfactorily that if the jury found multiple conspiracies among the defendants rather than a single conspiracy as charged in the indictment, they would have to acquit on the conspiracy count. Hom also claims that the judge should have charged that participation in one conspiracy of many did not constitute participation in a single overall conspiracy. We find these claims to be wholly without merit.

Sufficient evidence was adduced at trial to allow the jury to conclude beyond a reasonable doubt that Ong, Wah and Hom knew of the existence of other members of a joint plan and that each was aware that his arrangements with the investigators had been made in concert with arrangements for other gambling house operators.[2] See United States v. Bernstein, 533 F.2d 775, 793 (2d Cir. 1976); United States v. Manarite, 448 F.2d 583, 589 (2d Cir.), cert. denied, 404 U.S. 947 (1971). Specifically, there was testimony that Hom had approached INS agents with respect to making payments to avoid unexpected raids and had mentioned Ong's name in connection with a payoff scheme. On several occasions, meetings at which payments were made were attended by more than one conspirator, and on other occasions Ong, Wah and Hom appeared separately within minutes of each other to pay the investigators. After the March 1974 arrests by officers assigned to Special Prosecutor Nadjari, Ong made several payments for the houses of Wah and Hom.

Not only was the evidence sufficient to allow the jury to infer that each conspirator knew of his participation in a

2. Indeed, in his brief on this appeal Wong Wah concedes that Hom and Wah were aware that each was making payments.

broad scheme, but Judge Brieant actually instructed the jury that such a determination must be made and that proof of separate conspiracies would not support a conviction. We therefore find no basis for complaint in the instruction.

Young's Motion for a Severance

Eight months before the trial began, defendant Young moved for a dismissal of the conspiracy count against him and a severance of his case. Young claimed that transcripts of the tape recorded meetings between various defendants and the INS investigators conclusively demonstrated that no conspiracy ever existed among Young and his codefendants. Young stressed that the transcripts revealed that there was great animosity between him and Ong and that each indicated a desire to avoid any business dealings with each other. In particular, several of the transcripts contained derogatory comments about Young made by Ong, including warnings to Granelli and Kibble that Young could not be trusted. Young maintained that if the conspiracy charge was dismissed, his case should be severed to avoid his being unduly prejudiced by a spill-over effect of any evidence introduced at trial of those defendants who had participated in the conspiracy. Judge Brieant denied Young's motion on the basis of the government's representations of what it would prove at trial regarding Young's connections with the other defendants.

At the conclusion of the government's case, however, Judge Brieant dismissed the conspiracy count against Young on the ground that no reasonable juror could infer from the evidence actually adduced that Young had taken part in the conspiracy charged. Nevertheless, the judge refused to sever Young's case. He determined that most of the evidence that had been theretofore introduced against the other defendants concerning the existence and object of the conspiracy would also be admissible at a separate

trial of Young since he had made reference to the other conspirators in conversations with the INS investigators. Young unsuccessfully moved to set aside the verdict on the ground that the court erred in denying the severance. On this appeal, Young renews the same claim. We affirm the district court.

Once defendants have been properly joined under Fed. R.Crim.P. 8(b), dismissal of the count justifying the joinder will require severance of the remaining counts only if the defendant will be prejudiced by the joinder or if the count dismissed was not alleged by the government in good faith, i.e., with reasonable expectation that sufficient proof will be forthcoming at trial. United States v. Aiken, 373 F.2d 294, 299 (2d Cir.), cert. denied, 389 U.S. 833 (1967).

The government's proof was based almost entirely on testimony elicited from the INS investigators and the tapes of conversations with the defendants. Thus, the government knew well in advance what evidence it would be able to introduce at trial. The government was aware that while Ong had initially indicated that he spoke for eight gambling houses, including those on Catherine Street allegedly operated by Young, this hearsay boast was never corroborated by payments through Ong from any houses other than those operated by Wah and Hom. Furthermore, the government ostensibly knew that the tapes revealed antagonism and distrust between Ong and Young that would have impaired any relationship conducive to the success of the conspiracy. Clearly the government cannot have acted in good faith unless it had a reasonable expectation that it could prove Young's participation in the conspiracy despite this contrary evidence. We find that the government's case, albeit based on a novel and questionable theory of conspiracy, satisfied this standard.

From the time the government first learned of Young's objection to his inclusion in the conspiracy count, it has maintained that the mutual interest and awareness by Young and Ong in each other's negotiations with INS investigators was sufficient to charge them with participation in a single conspiracy despite the absence of any concerted action between these defendants. The government has consistently contended that the mere knowledge of all defendants that there existed a scheme to bribe investigators, conjoined with individual acts of each defendant to ensure the success of his part of the common design, satisfied the elements of the conspiracy charged. It is apparently the government's claim that since each defendant would benefit not only from his individual arrangement with INS officials, but also from the cumulative decrease in successful raids in Chinatown gambling houses, a tacit unlawful agreement could be inferred even where there was no evidence of direct communication about the matter with Young. Cf. United States v. Cogan, 266 F. Supp. 374, 377-78 (S.D.N.Y. 1967).

The novelty of such a theory is evidenced by the fact that the government's primary support for its proposition is an extract of a Canadian case, Rex v. Meyrick and Ribuffi, 21 Crim. App.R. 94 (1929), in which the court found a single conspiracy where two nightclub proprietors offered bribes to a police officer individually, but in the knowledge that the other was doing likewise.[3]

We may not agree that the law of conspiracy should be extended so far. See United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). We do not, however, equate novelty or

3 If the government proffered an acceptible theory of conspiracy law, it would not be rendered less viable by a display of animosity among conspirators. See United States v. Tramunti, 513 F.2d 1087, 1106-07 n.23 (2d Cir.), cert. denied, 423 U.S. 832 (1975); United States v. Mallah, 503 F.2d 971, 980 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975).

even error with bad faith. In the absence of proof that the government's theory was frivolous or clearly rejected by recent precedent of which it was or should have been aware, we will not find that an argument has been prompted by bad faith simply because it is unsuccessful.

We cannot, however, agree that Young's joinder with the other defendants was free from prejudice. As Judge Brieant stated, Young's mention of Ong's arrangement with INS investigators may have allowed the government to introduce into evidence at a separate trial of Young the outlines of the conspiracy proven at this trial. It is improbable, however, that the evidence concerning the nefarious reputation of Ong or any mention of the subjects presently complained of and discussed infra would have played any role in a trial of Young alone. Nor is it likely that the government would have been permitted to introduce the multitude of tapes concerning solely the other defendants in which they literally convicted themselves out of their own mouths. These facts, when added to the prejudice inherent in any multi-defendant trial, make it possible that Young's relationship to the other defendants, by reason of his physical presence in the courtroom, injected an element of guilt by association into the jury's deliberations. See United States v. Branker, 395 F.2d 881, 887-89 (2d Cir. 1968), cert. denied, 393 U.S. 1029 (1969); cf. United States v. Kompinski, 373 F.2d 429 (2d Cir. 1967).

Our conclusion that Young should have been given a separate trial to avoid undue prejudice does not automatically require reversal. An error that affects no substantial rights of the defendant is thereby rendered harmless and does not constitute grounds for relief. Fed.R. Crim.P. 52(a). Harmlessness is a relative term that requires specific definition in each case by determining the effect on the jury's verdict of the error's absence. See

Chapman v. California, 386 U.S. 18, 22-23 (1967); Kotteakos v. United States, 328 U.S. 750, 762 (1946). Thus, where untainted evidence of guilt is substantial, a greater demonstration of prejudice resulting from an erroneous failure to sever must be made before the error will be considered to require reversal. See Loftis v. Beto, 450 F.2d 599 (5th Cir. 1971) (denial of severance after codefendant confessed was harmless error where evidence of defendant's guilt was overwhelming and no reasonable jury could have reached a different result at a severed trial). Cf. United States ex rel. Ross v. LaVallee, 448 F.2d 552, 554 (2d Cir. 1971).

No evidence could be more inculpatory than the tapes heard by the jury of meetings at which Young arranged to make payments to Granelli and Kibble, and later meetings at which payments were actually made. Young never denied making the payments, but only joined the other defendants in their attempt to establish the defense of coercion. Little evidence was introduced to support this theory of coercion and it was contradicted in Young's case by his suggestion to the investigators of illegal means by which they could [illegible]e more money. Given this record, we are convinced beyond a reasonable doubt that any jury would have reached the same verdict had Young been tried separately and therefore that his trial with the other codefendants was harmless error. See United States v. Glasser, 443 F.2d 994, 1003 (2d Cir.), cert. denied, 404 U.S. 854 (1971).

Inadmissible Evidence on the Tapes

Ong maintains that throughout the trial the prosecution interjected reference to his activities that were irrelevant to the charges and that these references were so prejudicial and inflammatory as to deprive him of a fair trial. Although the activities mentioned were often those of Ong alone, the other defendants claim that the improper

references pervaded the trial and prevented the jury from rendering a verdict based solely on the evidence of bribery properly before them.

It is, of course, desirable in any criminal trial to keep from the jury any evidence of malfeasance by the defendants not related to the charges at issue. See United States v. Tomaiolo, 249 F.2d 683 (2d Cir. 1957). Nevertheless, we find that any reference to such activities was made with the prior knowledge of the defendants and, in the face of the massive evidence of guilt on the bribery and conspiracy charges, was unlikely materially to influence the jury.

The question of unrelated information on the tapes was brought to the district court's attention at least four months before the trial. At that time, Ong's attorney informed the court that the copies of tapes that he had already obtained included potentially inflammatory and prejudicial material that might require redaction. The judge expressed a willingness to redact or give precautionary instructions with respect to such material, but in the course of the conference he informed counsel that he wanted to know of motions "with respect to the tapes or the transcripts" prior to trial to avoid interruption of testimony to deal with evidentiary problems. No such relief was sought before trial. Nevertheless, during the early stages of the trial, the court was sufficiently concerned about claims of prejudicial material on the tapes that it did interrupt the trial to hold a hearing with the result that some material was redacted.

Defendants maintain, however, that some inflammatory material still found its way into evidence. The most serious of these contentions is that some recordings implied that Ong and Wah were familiar with illegal narcotics traffic. The jury was permitted to hear a conversation of January 23, 1974 in which Ong informed the

INS investigators that "two pounds" of "white stuff" had been taken from a local barber shop. In response to the investigators' questioning, Ong recited the value of the narcotics and revealed where they had been hidden. He also told the investigators that his knowledge was limited because "I don't do that no more." The court refused to redact this tape on the ground that it only related "local news," was not prejudicial, and demonstrated the close relationship between Ong and the investigators.[4]

The jury also heard a conversation of February 6, 1974 wherein Ong and Wah discussed the price of a kilo of heroin in which Granelli had expressed an interest. The conversation was interrupted when Ong, seeing the approaching Hom, warned the others not to discuss heroin in the presence of the co-conspirator. When Hom left, Ong advised Wah in Chinese not to become involved in the proposed narcotics deal and then informed the investigator that he was too old to get involved in such dealings. The district court determined that this conversation did not implicate any defendant in any wrongdoing unrelated to the charges being tried and thus refused to redact it.

These conversations were not wholly irrelevant to the issues being tried in the case and thus the district court had discretion to determine whether the probative value of the conversations was outweighed by their prejudicial nature. United States v. Catalano, 491 F.2d 268 (2d Cir.), cert. denied, 419 U.S. 825 (1974); Fed.R.Evid. 403. Although ordinarily there are few subjects more potentially inflammatory than narcotics and thus such evidence should usually be excluded in a non-narcotics trial, we believe that in the total circumstances of this case, the

[4] The trial judge also determined that the rule of completeness required introduction of the entire transcript to prevent mutilation of the conversation that would make it unusable. As we have determined that the conversation was admissible on other grounds, we need not determine whether the rule of completeness applied to this situation.

trial judge did not abuse his discretion in admitting the challenged conversations.

Defense counsel had argued in their opening statements that any payments made by defendants were coerced by the immigration officers' threats to close the gambling operations on which defendants were financially dependent. The conversations in which the parties openly discussed illegal operations in the neighborhood and the possibility of obtaining narcotics were probative of the prosecution's retort that cordial relations among the parties belied the theory of coercion. See United States v. Cockerham, 476 F.2d 542, 545 (D.C. Cir. 1973). Defendants have not cited any other conversations that would have demonstrated congeniality among the parties without including some references to illicit activities. Moreover, the reference to narcotics in this case did not inculpate any defendant in ongoing illegal transactions. As Judge Brieant noted, it was possible to infer from all these conversations only that defendants, especially Ong, were aware that various narcotics transactions occurred in Chinatown. It was neither inevitable nor probable that the jury would infer involvement of any of the defendants from that knowledge. Thus, even though the conversations involved volatile material not directly connected with the instant indictment, they could be admitted to prove the guilt of defendants under that indictment. See United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975).

Moreover, we believe that the defendants' dilatoriness in bringing the challenged references to the attention of the district court indicates that before the trial they did not consider mention of other illicit activities to be as prejudicial as they now claim. Counsel for Ong maintains that he understood Judge Brieant's request for pre-trial motions to pertain only to motions for corrected, addi-

tional or alternative transcripts and not to motions for redaction. This interpretation of the judge's ruling, however, is contrary to common sense, especially in light of the court's constant expression at the pre-trial hearing of a desire to try the case unimpeded by collateral issues.

In any event, as discussed above with respect to Young's claim for severance, the overwhelming proof against defendants placed upon them a heavy burden to demonstrate that any substantial rights were adversely affected by the rulings of the court. We do not believe that that burden was satisfied by the introduction of conversations involving narcotics. Since those conversations revealed awareness rather than involvement in narcotics activities and since the trial judge persistently admonished the jury that traffic in narcotics was irrelevant to the issues before them, we believe beyond a reasonable doubt that the jury found the defendants guilty on the basis of the substantial evidence of bribery and conspiracy without considering any other illegal acts. See United States v. Williams, 523 F.2d 407 (2d Cir. 1975); United States v. Bell, 500 F.2d 1287 (2d Cir. 1974).[5]

The tapes also reveal Ong's warnings to Granelli and Kibble not to let Young fall behind in his payments because the latter was untrustworthy, exemplified by the assertion that Young had never repaid a $5000 payment made to police officers by Ong on Young's behalf. Al-

5. The same rationale applies to other instances in which allegedly inflammatory material was not redacted. Statements by Ong that he had given bribes or gratuities to other police officers for many years and had been arrested by officers under the jurisdiction of Special Prosecutor Nadjari were made in furtherance of the conspiracy and were related to the issues before the jury. Thus the judge was entitled to weigh their probative value against the possibility of prejudice. In light of the overwhelming evidence of guilt and the failure of defense counsel to make timely motions to omit these allegedly prejudicial references, we cannot say that the court abused its discretion in admitting into evidence the tapes and transcripts of or testimony about conversations containing these statements.

though this statement clearly was hearsay with respect to Young, we do not believe that he suffered any prejudice from its admission into evidence sufficient to require reversal.

The court initially allowed the government to elicit testimony concerning the $5000 payment on the ground that it might show the animosity between Young and Ong and thus be exculpatory of Young on the conspiracy count. However, the court immediately advised the jury that the conversation could not be considered with respect to Wah or Hom. The court later instructed the jury that it could not consider Ong's statement in determining whether Young had ever previously engaged in any act of bribery. The judge did, however, permit the jury to consider with respect to Ong the fact of his having made the statement.

These rulings, which were repeated during the court's charge to the jury, placed Ong's story of the $5000 payment into proper perspective for the jury. They allowed the jury to consider Ong's animosity towards Young without inculpating the latter in an unverified scheme. Given these instructions, we find beyond a reasonable doubt that the jury convicted Young solely on the basis of the evidence properly introduced against him. Cf. United States v. Light, 394 F.2d 908 (2d Cir. 1968).

Curtailment of Wah's Cross-Examination

As discussed above, despite expressions of concern about the mention of narcotics, references to that issue were injected during Granelli's testimony. After the government completed its direct examination of the INS investigator, the subject of narcotics was addressed directly by Wah's counsel, Mr. Herman. In his cross-examination, Herman asked Granelli if he had tried to involve Wah in a narcotics deal. When the court sustained an objection to this question, Herman responded by

asking Granelli if he had requested of Ong whether Wah would deal in narcotics. The court sustained an objection to this question, instructed the jury about drawing any inference from the question, and cautioned Herman to avoid this area of interrogation. After Herman was denied a side bar conference, he asked Granelli if he had told Ong that he, Granelli, "had people who were eager to get narcotics" from Wah. Judge Brieant immediately directed Herman to take his seat and his cross-examination of Granelli ceased.

Wah now renews his claim, initially made at a post-trial hearing, that limitation of his cross-examination of Granelli deprived him of his Si Amendment right to confront witnesses against him. Wah claims that the issue of narcotics had been introduced on direct testimony and was therefore a proper subject for cross-examination, especially to allay any suggestion that he was involved in narcotics. He further contends that the untimely curtailment prevented perusal of other areas of cross-examination and prevented the eliciting of testimony relevant to his defense. We find all these claims to be without merit.

We have already discussed the extent to which narcotics had been mentioned in connection with Granelli's direct testimony. These references did not directly link any of the defendants with ongoing illicit activity but merely demonstrated a relationship among the parties to the conversation. Thus, Wah was not harmed by the court's refusal to allow the cross-examination insofar as he would have attempted only to rebut a supposed inference of his involvement in narcotics. See United States v. Green, 523 F.2d 229, 237 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

Nor did the order to cease cross-examination after repeated disregard of the court's rulings unduly prevent

Wah's effective investigation into other legitimate areas. We have not been apprised of those areas which were not adequately covered by Herman prior to cessation of his cross-examination or by other counsel. Indeed, at the close of redirect examination, the judge asked all defense counsel individually if they had any further questions. Counsel for Wah replied that he had none. During the post-trial hearing at which Wah first presented this claim, counsel indicated that he would have liked to cross-examine with respect to a conversation between Wah and Kibble that Granelli testified to having overheard. Wah, however, not only failed to address this matter on recross, but also failed to question Kibble, who followed Granelli to the stand, about the conversation. We therefore conclude that the court's curtailment of Wah's examination did not impermissibly preclude inquiry into other subjects.

Finally, we do not agree that the court's order prevented the jury from having "the benefit of the defense theory before them" by denying a defendant "the effective cross-examination . . . of an adverse witness." Davis v. Alaska, 415 U.S. 308, 317, 319-20 (1974). In *Davis*, the Supreme Court ensured a criminal defendant of the right under the confrontation clause of the Sixth Amendment to explore through cross-examination the partiality and motivation of a government witness. 415 U.S. at 316. Given the defense theory that the INS investigators had initiated the requests for payment, evidence of coercion by the witness would have been most proper. Wah claims that his questions properly attempted to contribute to this theory by demonstrating that the INS officers were attempting to coerce defendants into a narcotics scheme, from which the jury could have inferred an attempt to coerce defendants into a bribery scheme as well. The basis for these questions was the tape of the February 6 con-

versation in which Granelli inquired about obtaining drugs from Wah. We find that Wah's argument that he wanted to show coercion in the narcotics context is too remote and speculative in the face of the complete absence of any evidence of coercion in the conversation. Moreover, it is hard to believe that the INS investigator wearing the recorder would have thus inculpated himself in an illegal scheme. We do not believe that the Court in *Davis* meant to sanction speculative expeditions into areas only tangentially related to the facts in issue in the hope that some basis for implying an ulterior motive might be found.

Moreover, the total cross-examination was sufficient to afford the jury a basis to evaluate the defense theory. Defense counsel preceding Wah's counsel had questioned Granelli at length about his relationship with defendants in an attempt to prove that he had demanded and accepted payments long before the time covered in the indictment. The same theory was argued to the jury in the opening and closing statements of defense counsel, and the judge instructed the jury with respect to that defense. Under these circumstances the curtailment of Wah's cross-examination did not deprive him of any right of confrontation.

The Government's Summation

The defendants also urge that improprieties and errors in the prosecutor's summation and rebuttal deprived them of a fair trial, so that their convictions should be reversed.[6] We disagree.

In view of the defense insinuated by the cross-examination of the government's witnesses and argued to

6. We note that while the appellants complain of statements made by the prosecutor in his rebuttal argument, the appellants have failed to provide the court in their appendix with copies of their own summation. In such case obviously the court ought to be provided with copies of the summations to which the rebuttal of the prosecutor was addressed.

the jury in the summation of counsel, we find nothing in the summation and rebuttal of the prosecutor which was not warranted by the evidence. All the prosecutor's arguments which were of doubtful propriety were adequately and immediately corrected by the trial judge upon objections of counsel. The other matters now complained of do not warrant objections of appeal and surely did not seem to defense counsel to warrant objection at the time. Although under certain circumstances—as where the trial judge repeatedly brushes aside valid objections—we do not expect counsel to continue to make objections before the jury, here the trial judge responded effectively to all the defense objections during the summation. In such a case, we give little weight to the matters later complained of for the first time on appeal. United States v. Briggs, 457 F.2d 908, 911-12 (2d Cir.), cert. denied, 409 U.S. 986 (1972); United States v. Perez, 426 F.2d 1073, 1081 (2d Cir. 1970), aff'd, 402 U.S. 146 (1971); United States v. Indiviglio, 352 F.2d 276, 280 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966).

We find only one instance which is even worthy of comment. During the government's rebuttal, the Assistant United States Attorney characterized Ong as "Chinatown's chief corrupter for twenty years." Ong maintains that this description of him in the hierarchy of corruption was unsupported by the evidence and suggested to the jury that the government held information not introduced at trial that implicated Ong in other crimes. Ong does not claim that the accusation that he engaged in illicit activities over an extensive period of time is itself inaccurate, since the tapes received in evidence revealed that he bragged of having bribed police officers and having supplied them with additional gratuities long before meeting Granelli and Kibble.

However prejudicial this characterization may now

appear, no objection was made at trial. Perhaps this was because the statement was made parenthetically in the course of an argument concerning a wholly unrelated matter and thus was unlikely to be noticed even by an attentive listener. Moreover, we see no reason to believe that the addition of an adjective that exaggerated Ong's otherwise conceded illicit activity would in itself constitute reversible error. In United States v. Gonzales, 488 F.2d 833 (2d Cir. 1973), and Hall v. United States, 419 F.2d 582 (5th Cir. 1969), cited by Ong as cases in which prejudicial characterizations required reversal, the appellation complained of was combined with additional and persistent errors on the part of the prosecuting attorney or the district court. In neither case did the appellate court hold that the improper characterization alone was a basis for reversal. See United States v. Guidarelli, 318 F.2d 523 (2d Cir.), cert. denied, 375 U.S. 828 (1963). In light of the overwhelming evidence against Ong, see United States v. Benter, 457 F.2d 1174, 1178 (2d Cir.), cert. denied, 409 U.S. 842 (1972), we find beyond a reasonable doubt that the placement of Ong at the pinnacle of corruption in Chinatown could not by itself or combined with any other error have had the effect of improperly prejudicing the defendant.

We therefore conclude that none of the prosecutor's comments, singly or cumulatively, had the effect of depriving any of the defendants of a fair trial.

Convictions affirmed.

NY 58-1875
1.

TRANSCRIPT OF INITIAL CONVERSATION BETWEEN APPELLANT YOUNG AND GOVERNMENT WITNESSES GRANELLI AND KIBBLE (EXHIBIT 10)

Transcription of a recorded conversation between ALBERT YOUNG and Immigration and Naturalization Service (INS) Investigators LAWRENCE GRANELLI and JAMES KIBBLE; recorded on December 13, 1973, at approximately 4:00 p.m., at the Jade Chalet Restaurant, 109 North Street, Chinatown, New York City.

KIBBLE (K):	It's on now. (Pause)
GRANELLI (G):	You wanna lock the door? (Pause)
Barmaid:	(Inaudible)
G:	Hi.
K:	Hello.
Barmaid:	Yes - what would you like?
G:	I'll have a glass of beer.
K:	(Inaudible)
Barmaid:	(Inaudible)
Unidentified Male (UM):	(Inaudible)
Barmaid:	Yes. (Inaudible)
G:	I'll have a Heinekin.
Barmaid:	Two Heinekin?
K:	I'll have a Budweiser.
Barmaid:	Budweiser - and Heinekin - yeah.

K: Do you have the money for the...?

Barmaid: ALBERT -

YOUNG (Y): Hello.

Barmaid: (Inaudible)

Y: (In[illegible]e)

K: Hello, ALBERT. How are you doin'?

Y: How you do - how you doin'? You been here long?

K: Just two minutes.

Y: (Inaudible) Yeah - oh.

Barmaid: ALBERT - you gonna sit down here?

Y: Yeah - I'll sit over there.

Barmaid: Okay - yes - what do you want - ALBERT? J&B and soda?

Y: Ehh - okay. (Inaudible - ALBERT talking to barmaid)

Barmaid: Here, ALBERT. All right?

Y: Okay. Thank you.

Y: Who is that guy?

G: I don't know him.

Y: You sure? Hah?

G: You know him?

Y: I don't. If you - you - don't know - okay. Um - what's on your mind?

K: What?

Y: Take here - here's two.

K: He gave us two, All right?

Y: I give you two - two - alright?

K: What's the deal?

Y: Two.

K: Yeah - what - what deal? Do you want -

Y: You can pass the outside - you go inside. You must let me know first. Understand? I don't like scare - (inaudible) - you get. I fix up all, I fix up all - all immigration case. Here.

K: All immigration cases?

Y: I fix up all immigration case - I fix up all bond - that's right. (Inaudible) See?

K: Uh-huh.

Y: ...(Inaudible)...here - all - look at them. The bond company.

Barmaid: (In background - inaudible)

Y: (Inaudible) The bond company, right?

K: Right.

Y: ALBERT, gotta all case - I know that. See...(inaudible) here - TOPPER...you know TOPPIE?

K: Oh yeah. He, he handles the bond cases.

Y: Eh? - hah...ah...that's a all.

G: What are you - a lawyer? - You a lawyer?

Y: (Inaudible) see - huh - I'm supposed to go and see him now. I'm finish here. I go see TOPPER...I know information...You people must stay longer...How long? and if your not there - we cancel - right? Right? - If a you there show your face there, it continue - understand?

K: No...What do you mean?

G: No.

K: I don't know what you mean.

Y: Sometime they transfer you somewhere - not always stay here. I know that - see understand...see the time you stay here - This is okay - sometime they transfer you different location - cancel it - (inaudible) you understand?

K: What do you want us to do - let you know - when we come?

G: What do you mean about - us being transferred? What are you talkin' about?

Y: We cancel.

C: Yeah.

Y: This thing cancel.

C: We work Chinese investigations.

Y: Yeah, I know - sometire you can never know, you know, but we - I talking to you know...You never know - nobody know, right? You don't know yourself, right?

K: Right.

Y: See (inaudible)...they transfer you to Brooklyn or Staten Island, how you know? You don't know. See? Understand?

K: Yeah.

Y: (Inaudible)

K: It scares your customers?

Y: ....Scaren - I don't care - any secren go down anyway..(inaudible)..don't care here.. (inaudible...before I ask you, you don't know, say "I don't know ALBERT" (inaudible) you always ask me...I know that..(inaudible)

K: No. ALBERT..

Y: How could you - how could you know? Not - for you - not for me then I say well, I think of something - I don't know you.

K: Oh. You mean if they ask us.

Y: Yeah.

K: Oh. Okay.

Y: See? (Inaudible)

K: I'll say we don't know ya, okay.

G: Okay.

Y: (Inaudible)

K: Yeah - sure.

Y: (Inaudible) okay?

G: Okay.

K: Then how do we let you know? That we're going to come there? Do we call you?

Y: You should come - one guy - don't call me cause my phone - on tap - don't call.

K: Oh. Okay.

G: (Laughs) Your phone is tapped?

Y: I got lotta man - in...(inaudible)...they let me know...I got lotta man....in there . .they tell me - they say - "You don't call me"...

G: Who told you that?

Y: Huh?

G: Who told you that?

Y: (Inaudible) (all laugh) (inaudible)...don't talk something else..Don't talk these things.

K: Your telephone is tapped.

Y: Yeah.

K: Okay.

Y: Don't come 2 - 4 - 5. Come here everyday ...(inaudible)..you come once. Come my office. See if I'm not there - you say I want to see ALBERT...That's all...The other day you walked away...understand? (Inaudible) Don't say I'm in Immigration ...(inaudible) Mr. JIMMY - so and so.

K: Yeah okay...

Y: See - that's all

K: Don't write Immigration just put JIMMY there.

Y: Yeah, put JIMMY, I know, right? Just, just

K: Okay.

Y: You put Immigration - no good.

Y: You know the a - a Chinese Benevolent Association?

K: Chinese Benev....

C: Yeah.

K: Yeah.

Y: You at meeting?

K: No, I wasn't at the meeting.

G: ROWLAND went to it.

Y: Who?

G: ROWLAND.

Y: Oh, ROWLAND - oh - oh - ROWLAND your boss?

K: Um, not really.

G: We work for ROWLAND'S boss.

Y: Huh?

G: We work for ROWLAND'S boss.

Y: You work for ROWLAND'S boss? - so - ROWLAND - he's - ah - instruct you on what you got to do, right?

K: No.

G: No, not him.

Y: No?

K: ROWLAND'S boss tells us what to do.

Y: Oh, ROWLAND'S ah -

G: ROWLAND works separate. He works on the gangs - you know, the gang kids.

Y: Uh-huh.

G: Too many gangs here. Too much.

Y: I - I heard it yesterday - that meeting (inaudible) see, they trying to stop it (inaudible) Chinese (inaudible), all association, (inaudible) they try to stop it (inaudible)

G: Some of 'em are your good friends.

Y: Some are.

K: Oh, SOL MARKS is a good friend of yours.

G: Oh. Oh, okay. - You know him?

Y: (Inaudible) I know him.

G: You know him?

Y: He eat. He eat - be my guest.

K: Oh.

G: SOL MARKS, our District Director?

Y: ...(inaudible)...I take a picture with him next time - I take a picture and then you believe me -...(inaudible)... Huh? I don't show off...

G: Don't tell SOL MARKS that you take care of us.

Y: (laughs) He (inaudible) don't be afraid. See - that's why - I don't want to try double-cross, understand? We are good friends, see? You know me...we make a friends...I tell you how many times I go to Irrigation...(inaudible)...That guy he's a wise guy. Don't talk to them see he know - I know too - We all are work together.

K: But ALBERT - like last night when you came to us - I - uh you know, we weren't sure - we don't...we don't know - we didn't know you - so we were a little.....

Y: That's all right - You go find out if they know me. You don't play durry - you -

K: But I don't like to ask around. I don't like to

Y: You - you always go up Hang Cung on Pell Street - the bar -

K: Hong Cung.

Y: Yeah, Hong Cung - you go there - some people tell me you always hang around in bar there. All right, that's ah your business.

K: But we've gotta drink somewhere.

Y: Yeah - that's ah your business - right? We don't care...We want fair to you - fair to me - That's all - I'm running - my association - you know how many member I got?

K: What?

Y: Four thousand members.

K: Four thousand members?

Y: Yeah - I'm the secretary - I'm the boss.

K: You're the boss. How?

G: How many cities is the Tsung Tsin in?

Y: Tsung Tsin - all China - all of China - see different...all association, only speak one dialect - Hakka only one dialect...how long before you can speak my dialect you can join... - The only... you know how many dialect Chinese? Mandarin, Toivan, Toysan, Cantonese,

G: Foochow

Y: Shanghai, Foochow, Foochow couldn't join - couldn't join me.

C: Couldn't join it, huh?

Y: Be sure he speak my dialect. That's all - he can join - I don't care where in China. He can join it.

G: Four thousand members - that's a lot.

Y: That's deal.

K: That's a deal, okay.

Y: Come on - drink - drink up.

G: No.

Y: Two more bottle.

G: Nah, we gotta go back to work yet.

Y: Ah, come on.

K: Yeah, we work nights.

Y: (Calls to barmaid)

Barmaid: Yeah -

Y: I gonna want a give two more bottles of - ah - beer.

Barmaid: Okay. Yes.

Y; Then give me check - I'm in hurry too.

Barmaid: In hurry too?

Y: I hurry.

Barmaid: How about you 'nother drink?

Y: No...too early...I love you - I - I come back tonight (speaking to barmaid)

Barmaid: Ah anytime (inaudible)

Y: (Laughs)

G: Whose place is this?...This your place?

Y: (Inaudible) I know him - friend of mine - because of that come here.

Barmaid: ALRIFT, stay here make me company. Nobody here.

Y: Oh yeah.

Barmaid: (Inaudible)

Y: Nobody, nobody here only you, huh?

Barmaid: Yeah.

Y: Only you here!

Barmaid: (Inaudible)

Y: (Inaudible)

Barmaid: (Inaudible) Open up. (Inaudible) I can't open right?

Y: Open up..open up..till you open up (inaudible)...Now say open up - you crash the register - that's all.

Barmaid: (Inaudible)

Y: You know - you know the - number 12 or number 12 - that - ah - Chey restaurant? One killed - one shot.

Barmaid: What happened there?

Y: The Dumpling -

K: The Dumpling,

Y: The...

K: The Dumpling House.

Y: Yeah.

K: I saw it in the paper.

Y: Yeah.

G: Division Street - right next door to you.

Y: One killed - one hurt.

Barmaid: It happened in the Dumpling House? That bitch!

Y: Yeah - somebody - you know

Barmaid: Yeah...now - oh - how. .

(Pause)

Barmaid: Over there...they're busy in the daytime you know - and - that's how they - they - got a money but here nothing - I don't care money - but - you know, sometime - sometime you don't got a customer in day.

Y: (Inaudible) you are not turning against them - you just open up, that's all.

Barmaid: Yeah - cause the money mean nothing, you know.

Y: That's all - that's all - listen...you can take away.

Barmaid: One more shot?

Y: Nah.

Barmaid: Make you warm.

Y: Shot...shot you head - shot

Barmaid: Play with me - I don't want to die you know.

Y: Um - don't go there no more, see. Don't cross that way - you know.

C: How much is it? Two hundred?

Y: Yeah.

Y: Don't talk JIMMY. Don't talk BENNY.

K: We don't tell anybody.

Y: (Inaudible)

K: (Inaudible)

Y: My man - my son...(inaudible) in downstairs - he always try to chase 'em...(inaudible) young man - don't mention anything - he say I don't know NOTHIT!

K: Who's this?

Y: "Round my place - one guy - ...always hang the street talk - try to talk to you - that's wise guy you know...He try to talk to you.

K: Oh - oh - he try's to talk to us.

Y: (Inaudible, whisper)...I say no, no, I say - you can oc talk to them, I say not me, I don't want to tall - I don't wan talk to you - (inaudible) - Immigration used be - used be - at - 62 Street - the - the Department - (inaudible) Irrigation Department - (inaudible whisper) - (inaudible) - somebody ask (inaudible) I say I not the case.

K: Yeah.

Y: That's all - that's all.

G: Listen...Mr. [illegible], he's an honest man. If you have dinner with him - don't tell him nothing.

Y: Don't worry -- Don't worry.

G: We'll go to jail for the rest of our lives for something like this.

Y: (Laughs) yeah.

Y: How long - how long you...there.

G: Two years.

Y: Two years. Too short...anytime (inaudible) ...Two years too short...You still new guys..That's - that's all right. That's all right if I talk to him - so what! No benefit for me. No interest in for me, right? That's why I talk to him.

G: Some people like to talk - we don't know.

Y: That's the reason I tell you - I'm warning you now - don't mention this to nobody - That's all.

K: We don't mention.

Y: Nobody - (inaudible) (whisper) (inaudible) - you want to talk to them - you go ahead - you talk - not me..see I say no - you go - you talk - not me - I don't go...

G: When do you want us to see you?

Y: Every week?...Sometime...you cross the street I see you...(inaudible)...just to shake hands - that's all - see? Understand?

K: What do you mean?...like next Thursday?

Y: Next Thursday...All right, next Thursday... you pass around the street - I see you... only you two...

K: Yeah.

Y: Each one...okay?

K: Okay...

G: When did you start wearing these hats, [illegible]? - You're a famous man - Everybody talks about the man with the big hat.

Y: (inaudible)...Big hat - huh - did you see? - You did not know that, huh! - Did you know that this hat - custom made -

G: Hum.

Y: Nobody can find a hat like this - you know where it come from?...My friend in England...my Chinese friend...

G: India?

Y: England.

K: Oh, England. Uh-huh.

Y: You can't buy this hat in New York State like this...

K: Are you around the street in the afternoon like...on Thursday? Do you want me to see you or what?

Y: Thursday...afternoon...long about four o'clock...just one guy come over.

K: Come over there?

Y: Yeah...(inaudible)

K: But will anyone see us?...you know, I don't want...

Y: No - they hang around with you right?

K: Oh, okay.

Y: (Inaudible) Right? (Inaudible) I look for ALLEPT that's all.

K: But everyone knows me.

Y: Know you - he say "ALLEPT not there" - you walk out - (inaudible)...JIMMY...I want to see you. That's all.

K: Okay, Thursday at four...okay.

Y: If I'm not there you...make it some other day, right?...I, I don't know, sometime I go to lawyer office...that's true. See - see how many you catch 'em...you son-of-a-gun...here...you catch 'em... (inaudible) this is all money - TOPPP - five hundred...TOPPP ...five hundred, TOPPP...five hundred...

K: There are all the aliens we - we're taking out of your place?

Y: TOPPPP...five hundred....Yeah, this a you take the ship -

G: TOPPP?

Y: Yeah. The bondsman -

K: (Laughs)

Y: Five hundred - ...(inaudible)...the ships - you know...you take the ships you know -

K: Your place always has the aliens.

Y: Yeah, not no more - I chase 'em out.

K: When...when did you start that?

Y: Ah - since - ah - you - that happen.

K: Since we got everyone in the basement. Yeah.

Y: Chase - 'em out...I don't want....

K: That's some basement you have down there.

Y: Remember - don't come in my place. Try wise guy he want to find out everything -

K: We won't tell -

Y: He gonna, he gonna talk you do you see, ALIEN? Tell him "don't know me"...that's all - ..don't say "yeah - yeah - yeah" - I say "NO" - Thursday"...

K: No we won't say anything.

Y: Hey - give a check - sorry - I - I go to the an - WOMEN.

K: Yeah - we gotta go to...

Y: /...I... /...I...m so an a,pointment with hi: ...ha'.

K: AIIIII - we'll pay for ours.

Y: I - I'll pay.

K: Okay.

(Inaudible background)

Y: Okay - all right...we'll see you, huh? Let ro go first. Huh - ...okay?

K: Okay AIIEEE.....

Y: (Inaudible)

K: We won't say anything - don't worry.

Y: I see you - huh -

K: Okay AIIIII.

G: Okay AIIIII. Take it easy.

K: Take it easy...We gotta go too, it about twenty after four

Y: (Phrase inaudible)

K: Okay - take it easy

(long pause)

K: Wanna get going?

G: (Inaudible) the check - hun.

K: Okay.

Barmaid: How come you leave?

K: Time to go - gotta go back to work.

Barmaid: Yeah - all right - see you -

K: Goodnight now -

Barmaid: (Inaudible)

K: (Laughs)

Barmaid: (Inaudible)

K: Bye-bye.

Barmaid: See you.

rosenthal US v. Young

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 28 day of Sept. , 1976 at No. 1 St. Andrews Pl., NYC deponent served the within ~~xxxx~~ Petition upon U.S. Atty. So. District of N.Y. the Appellee herein, by delivering ~~xxxx~~ 3 true copies ~~copy~~ thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 28 day of Sept. 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 19~~xx~~ 1978